G A _ P

Gómez-Acebo & Pombo

Main developments in employment matters introduced by Royal Decree-law 8/2020, of 17 March, on urgent extraordinary measures to deal with the economic and social impact of COVID-19

Área Laboral de Gómez-Acebo & Pombo

The extraordinary situation caused by COVID-19 has led to the adoption of urgent measures in all areas, particularly in the field of employment, where the measures are mainly aimed at making labour relations more flexible for the maintenance of economic activity or its resumption once the health crisis ends, without this entailing a loss of jobs.

In this urgent paper, we present the main employment law developments and their impact on companies.

1. The flexibilization of the procedure for suspending employment contracts or reducing working hours (commonly referred to as "ERTEs")

Firstly, ERTEs refer not only to the suspension of employment contracts, but also to reductions in working hours, which may also be an interesting option for some companies that maintain some business in this situation.

In general terms, the new Royal Decree-law 8/2020 includes a series of measures that aim to make the procedures for suspending the contract or reducing the working day more flexible for companies whose business is affected by COVID-19.

In this respect, a distinction can be made between two ERTE procedures linked to COVID-19:

a) ERTE due to force majeure:

The Royal Decree defines what constitutes force majeure for the purposes of the procedure and, in particular, refers to

— Those business losses **directly** related to COVID-19, including the declaration of the 'state of alarm', involving the suspension or cancellation of business, the temporary closure of premises open to the public, restrictions on public transport and, in general, reasons related to the prohibition of mobility. In view of the above, we consider that the ERTES linked to the closure of shops, gyms, museums, hotels, etc. are examples of force majeure.

— A lack of supplies that seriously impedes the continuation of business is also considered force majeure. Such would be the case of the automotive industry where supplies have not reached the factories because they came from China.

— Finally, those events directly related to the spread of the disease such as preventive isolation for contagion or other measures decreed by the health authority.

In these cases, measures are envisaged to make the procedure more flexible:

— The procedure is initiated directly by means of an application to the Labour Authority, which will be provided with a report justifying the measure and its link to COVID-19, as well as, where appropriate, supporting documentation. The Labour Authority must limit itself to verifying (or not) the existence of force majeure, issuing a decision within 5 days.

— The dialogue with the workers is more agile as there is no consultation process, but the workers will be informed of the application and, if there are workers' representatives, they will be provided with the report and supporting documentation provided to the Labour Authority.

b) Other ERTEs related to COVID-19:

When there are no direct events related to COVID-19, but there are other economic, productive, technical or organizational events related to it, this suspension of contracts or reduction of working hours may also be used.

In these cases, the procedure is not as fast as with force majeure, but measures have been implemented to shorten time limits. Among these measures, we can highlight that (i) in the absence of a statutory body of worker representatives, the negotiation with the workers can be done with the most representative unions, as well as (ii) the reduction of consultation periods to only 7 days.

2. Relief on Social Security contributions for companies conducting ERTEs due to force majeure

Companies that conduct ERTEs due to force majeure and when these have already been certified by the Labour Authority, may benefit from a 100% exemption in the payment of the company's contribution to the Social Security (Spanish National Insurance) and of the contribution to the joint collection of contributions if they have fewer than 50 employees registered on 29 February 2020. In the case of companies with 50 employees or more, as is the case with a large number of our clients, this exemption will be 75% of the company contribution.

However, the above advantages (as well as the rest of the extraordinary measures) are subject to the maintenance of employment in the company for a period of 6 months from the date of resumption of business.

The above qualification is, at the very least, unclear, involving great uncertainty about the impact of this measure on the companies that intend to benefit from the aforementioned relief. In particular, the Royal Decree does not make clear what it refers to as maintenance of employment, the periods for calculating the volume/employment of the workforce, the inclusion or not of temporary workers whose contracts are due to end earlier, whether it takes into account workers leaving for reasons beyond the employer's control or what the consequences of such failure are, i.e. whether they affect overall advantage in contributions or relate exclusively to those affected by the dismissals.

3. Other employment-related measures provided for in Royal Decree-law 8/2020 to address the exceptional health situation

a) Promotion of distance working:

The implementation of teleworking is considered a preferable alternative mechanism for maintaining business at the present time. In this way, the company should take the appropriate measures, if possible, to encourage its employees to work remotely before taking decisions with a greater impact, such as the cessation or reduction of business.

b) Flexibility of the working day:

Royal Decree-law 8/2020 provides for the adaptation of the working hours, as well as the reduction of the working hours of those employees who can prove that they have care duties towards their spouse, partner or relatives up to the second degree of consanguinity linked to COVID-19. In this regard, the closure of educational centres is considered to be a measure related to this need for care.

With regard to the adaptation of working hours, the Government refers to different options related to the care of family members in the distribution of working time or in respect of any other work condition that allows for the care of the family member or spouse, for example, change of shift or flexible hours, or change of workplace, among others.

Similarly noteworthy is the alternative of reducing the working day, which could reach 100% of the worker's working hours, having to notify the employer only 24 hours in advance.

In short, we are facing a situation of absolute exceptionality that has required a rapid response from the Government, rapidity that has come with problems of practical application regarding the approved measures, some of them with a potential impact on employment such as the enjoyment of benefits. In these circumstances, more haste is required in the regulatory implementation of this legislation is required, as well as a comprehensive and agile response from the Labour Authority when it comes to resolving ERTE applications.